

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: SANTA FE NATURAL
TOBACCO COMPANY MARKETING
AND SALES PRACTICES LITIGATION

NO. 16-MD-2695 JB/LF

Transcript of Proceedings before The Honorable
James O. Browning, United States District Judge,
Albuquerque, Bernalillo County, New Mexico,
commencing on November 28, 2018.

For the Plaintiffs: Mr. Nicholas Koluncich; Ms.
Erika Anderson

For the Plaintiffs Via Telephone: Ms. Melissa
Weiner; Ms. Randi McGinn; Ms. Kathy Love; Mr. Jeffrey
Haberman

For the Defendants: Mr. David Monde; Mr. Andrew
Schultz

For the Defendants Via Telephone: Mr. Peter
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1 THE COURT: All right. This is Jim
2 Browning on the phone. And I'll have entries of
3 appearance here in a moment. So let me call the
4 case. In Re: Santa Fe Natural Tobacco Company,
5 Marketing and Sales Practices and Products Liability
6 litigation, No. MD 16-2959 JB/LF.

7 If counsel will enter -- let's start with
8 the plaintiffs and the counsel here in the courtroom.

9 MR. KOLUNCICH: Good afternoon, Your Honor
10 and counsel. Nicholas Koluncich on behalf of
11 plaintiffs.

12 THE COURT: Mr. Koluncich, good afternoon
13 to you.

14 MS. ANDERSON: Erika Anderson, Your Honor,
15 on behalf of the plaintiffs.

16 THE COURT: All right. Ms. Anderson, good
17 afternoon to you.

18 And then I guess we have five counsel on
19 the phone. They're probably all plaintiffs' counsel,
20 right? So if you will enter your appearance as well.

21 MS. WEINER: Good afternoon, Your Honor.
22 Melissa Weiner, Pearson, Simon & Warshaw, for the
23 plaintiff.

24 THE COURT: All right. Ms. Weiner, good
25 afternoon to you.

1 Who else on the phone?

2 MS. MCGINN: Your Honor, it's Randi McGinn
3 and Kathy Love on behalf of the plaintiffs as well.

4 THE COURT: All right. Ms. McGinn, Ms.
5 Love, good afternoon to you.

6 Who else is on the phone? Anybody else?
7 Everybody got their mute button off?

8 MR. HABERMAN: Your Honor, I'm sorry,
9 Jeffrey Haberman from Schlesinger Law Office. Good
10 afternoon, Your Honor.

11 THE COURT: Mr. Haberman, good afternoon to
12 you.

13 Anyone else on the phone?

14 MR. BIERSTEKER: Yes, Your Honor. Peter
15 Biersteker for the defendants.

16 THE COURT: Oh, okay. All right. Mr.
17 Biersteker, let me get the counsel then for the
18 defendants in the courtroom.

19 MR. MONDE: Good afternoon, Judge. David
20 Monde from Jones Day on behalf of the defendants.

21 THE COURT: Good afternoon to you.

22 MR. SCHULTZ: Andrew Schultz for the
23 defendants, Your Honor.

24 THE COURT: Counsel here in the room heard
25 me apologizing. We're in the middle of a 21-day

1 trial, and it was going to be a 14-day trial, a
2 three-week trial, and I denied a motion in limine,
3 and they said, Okay, now we need seven extra days.
4 And I told them I couldn't give them seven
5 consecutive, because I had to do these three days
6 that we're in now for my death penalty case. They
7 pulled the death penalty off last Monday, so we
8 scrambled to put some stuff on this week. So that's
9 how we're getting together here.

10 But anyway, we've been in trial so
11 constantly, Jennifer Bean, my court reporter, had a
12 birthday on November 4, and we've been trying to take
13 her out to eat. And we ran late this morning, and we
14 went over and then we tried to run over, and kind of
15 got trapped at the restaurant. So I apologize.
16 You're not quite as bad as the folks just ahead of
17 you that I was late for. But, in any case, I
18 apologize for running a little bit late here.

19 I certainly will hear what anybody wants to
20 say on this dispute. I'm not sure -- I read these
21 things -- interestingly enough, I read them on
22 November 4, and then November 6, as they came in. So
23 I was looking at them as they were coming in and we
24 were in trial, and then reviewed them again last
25 night. There are probably things I don't quite

1 understand after reading the material. And that's my
2 own fault. But I'm not quite sure I've captured
3 everything in this.

4 But let me give you some sort of basic
5 guidelines here that -- and again, I'll hear what
6 anybody wants to say. But I think it's the custom
7 and practice of this Court and all my colleagues, and
8 the magistrate judges here as well -- I can't say
9 this is what's done all across the country -- but if
10 you have a deadline of, say, December 1st, and you
11 serve interrogatories on November 25, those are not
12 going to be considered timely. So chances are, I am
13 not going to allow that in this case and treat as
14 timely discovery that was not done 30 days, or
15 whatever the period of time to answer these
16 interrogatories and requests for production in
17 advance.

18 Having looked at all the interrogatories,
19 I'm not sure I've captured what the dispute is about
20 that is causing the plaintiffs so much nervousness
21 about their discovery. But as I tried to think about
22 it, I couldn't quite figure out why this was so
23 urgent for class certification. So even if I were to
24 extend the deadline, or be willing to, it didn't seem
25 to me this was the extraordinary case to probably do

1 it.

2 On the other hand, if the plaintiffs want
3 to delay their case and move everything forward, most
4 times defendants don't really care. You may have
5 some reason to care. But if they think this
6 discovery is so important, then you know, go ahead
7 and extend it, and I can work with you to extend the
8 deadlines to make it happen.

9 There was one other thing I was going to
10 say, and it's now slipping my mind, to let you know
11 what I was thinking about these issues. But it's
12 slipping my mind at the present time.

13 So with that said, Mr. Koluncich, are you
14 going to take the lead here for the plaintiffs?

15 MR. KOLUNCICH: It's my understanding that
16 Mr. Haberman is going to --

17 THE COURT: Mr. Haberman, if you want to
18 take the lead on this.

19 MR. HABERMAN: Sure.

20 MS. WEINER: Your Honor, this is Melissa
21 Weiner. I was planning to respond on behalf of the
22 plaintiffs this afternoon.

23 THE COURT: All right. Are you comfortable
24 with that, Mr. Haberman?

25 MR. HABERMAN: Yes, Your Honor. Melissa

1 and I worked closely on the issues, so --

2 THE COURT: All right. Ms. Weiner.

3 MS. WEINER: So to respond just primarily
4 on the discovery that was served on RJRT a couple of
5 days before the close of discovery, the plaintiffs'
6 position, Your Honor, is that that discovery was
7 already ripe for response a couple of years ago.
8 That discovery -- and I'm sure Your Honor read in the
9 submissions by the parties, we were under the
10 impression that those documents were being produced
11 on behalf of RJRT. And I think it's maybe a moot
12 point. I think we have -- whether they are late or
13 not, or whether we ever have a meeting of the minds
14 on that, and what the actual wording of the responses
15 on behalf of RAI, whether or not -- and the case law
16 requires that RJRT be ordered to produce documents as
17 a subsidiary, I think it maybe doesn't matter at this
18 point. I don't want to belabor that point, because I
19 think we've gotten to a place where the defendants
20 are willing to produce the information that we
21 believe is outstanding. And that's where we're in a
22 bit of a situation with the schedule that we didn't
23 anticipate we would be in, since the defendants were
24 on notice of this issue, you know, at least 45 days
25 ago.

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1 So while those requests were, quote, served
2 at the end of October, they were already, in the
3 plaintiffs' mind, served long before the close of
4 discovery. So in our mind those are separate and
5 apart from the kind of cleanup interrogatories, if
6 you will, that relate to pricing, which we believe
7 does matter for class certification and should be
8 answered, even if it means some very brief extension
9 to the schedule so that we can get that information.

10 And what we have done in order to try to
11 expedite this process -- and we've had discussions
12 even up until this morning about -- the discussions
13 renewed late last night -- about how we may get some
14 of that information produced such that we can use it
15 for class certification.

16 Your Honor, what matters and what we
17 believe is outstanding are pricing documents that
18 relate to Marlboro and Santa Fe Natural American
19 Spirit pricing by region, by zip code. That
20 information was, we now believe, maybe not produced,
21 because it might be in the possession of RJRT, even
22 though it really is to the Natural American Spirit
23 cigarettes. So we're unclear why it hasn't been
24 produced. But regardless, we tried to narrow the
25 interrogatories and the requests for production that

1 we think are relevant to class certification so we
2 don't have to have any delay in the schedule.

3 And Mr. Monde indicated over email to me --
4 I think it was either last night or this morning --
5 that if the parties can discuss a more limited scope
6 of search terms, we can perhaps get those documents
7 sooner than any of the other documents that might be
8 responsive to the request. We would like to do that
9 on a very expedited basis so that we only have a
10 very, very small extension of the current schedule.

11 I think you've heard from Mr. Schlesinger
12 the plaintiffs' position on keeping this case moving
13 forward, which is why we had hoped that we could just
14 get these documents. We've been told by defense
15 counsel there aren't that many documents that have
16 yet to be produced. So we did not anticipate that it
17 would cause any further delay.

18 So we're hoping today that we can get a
19 couple of dates certain, one for an exchange, or an
20 agreement upon search terms that will yield the
21 pricing documents that are the subject of those
22 limited requests for production that we had
23 prioritized. They're both in the papers. And Mr.
24 Monde and Mr. Biersteker know, I think, what we're
25 referring to. It's the email that Matt Schultz sent

1 beginning of November. And a date certain for
2 production of those documents, and perhaps a slight
3 extension of the schedule, no more than 30 days, so
4 that we can get those documents and determine what is
5 needed for expert reports and class certification.

6 I don't know if Jeff has anything to follow
7 up on that.

8 MR. HABERMAN: I think I'm fine for now.
9 You know, the plaintiffs are of the view that we want
10 to move this case forward, as Mr. Schlesinger has
11 communicated to the Court over and over again.

12 This -- we were a bit taken aback by some of the
13 responses that the defendants have provided us
14 because, on the one hand, they had indicated that
15 RJRT wouldn't have any more documents than was
16 already produced. And then, on follow-up
17 conversations, it seems like RJRT may have many more
18 documents that haven't been produced. So we don't
19 know exactly where the defendants stand on that.

20 We tried to accelerate and put before the
21 defendant, the defendants, the most pressing -- or
22 the most important pieces that we would like now, so
23 that we can keep the schedule as is, and haven't
24 gotten a full answer from them on that. So, you
25 know, we're waiting to hear what Mr. Monde has to say

1 in response. But I think Melissa covered it. That's
2 what's in the queue, Your Honor.

3 THE COURT: I do now remember what I was
4 going to say, and one additional point is that, you
5 know, if you have deals, if you've struck deals and
6 have agreements, then I'll enforce those, even if it
7 means going beyond the discovery deadline. So I'm
8 not trying to upset those.

9 And then, secondly, I don't remember on the
10 schedule if we set a deadline for motions related to
11 compelling discovery. But it seems to me that that
12 may be what we are really dealing with here, are
13 motions to compel discovery that was made in the
14 past, and not necessarily serving new discovery this
15 late.

16 Let me go back to you, Ms. Weiner. I guess
17 there are some phrases you're using both in the
18 briefing, and you've used them here today, and I just
19 am not sure I understand what they are. You said
20 that things were ripe for response, and in the
21 plaintiffs' mind these discoveries -- these discovery
22 requests had been made. I guess I -- how, unless a
23 discovery is made on paper and served on the other
24 side, what difference does it make whether it's in
25 the plaintiffs' mind or not?

1 MS. WEINER: So in July of 2016, there was
2 discovery that was answered by RAI and Santa Fe. At
3 that time, I think RJRT was newly in the case. And
4 the responses from RAI stated that RJRT will produce
5 responsive materials, whether in response to these
6 requests or duplicate requests directed to RJRT. So
7 plaintiffs were under the impression that we didn't
8 need to serve duplicate requests; that they were
9 producing documents and information on behalf of all
10 defendants.

11 And it wasn't until Mr. Burkhalter's
12 deposition in August that we learned that they
13 hadn't, in fact, searched all of the RJRT responsive
14 documents and document repositories.

15 So that is why I say we believe they were
16 ripe for response. We believe that, based on the
17 law -- and we've been meeting and conferring on this,
18 Your Honor, for months. So, I mean, there has been
19 case law and has been correspondence back and forth
20 between the parties in the hopes to not have to
21 involve Your Honor in this dispute, as to why the law
22 requires production of relevant documents by a
23 subsidiary, which RJRT is of RAI, and why they were
24 under an obligation to produce those documents.

25 Mr. Schultz and Mr. Monde have had many

1 conversations about this. Again, not to belabor the
2 point. I think we're in a place where we are -- we
3 have an agreement that RJRT is going to respond and
4 produce documents, and we have agreed to prioritize
5 the requests for production that we think are most
6 relevant for class certification.

7 And so, as Your Honor said, probably we
8 could have brought a motion to compel. Instead, we
9 tried to just work it out amongst counsel to
10 prioritize these requests and get the information
11 that we believe we need for class certification,
12 while not delaying any further with motion practice
13 and hearings and, you know, simply having an
14 agreement between counsel.

15 THE COURT: What are you wanting the Court
16 to do today?

17 MS. WEINER: We would like a -- whether
18 it's by court order assisting the parties with a
19 timeline to exchange and agree upon search terms that
20 might -- I mean, it's our belief that defense counsel
21 has the burden here to produce the relevant
22 information. So we would like search terms that they
23 believe will yield the documents that are responsive
24 to the limited requests that we have in the papers.
25 And it's, like, four pricing requests. And we would

1 like a date that those are going to be produced.
2 It's now been about a month. And we think no more
3 than 30 days -- a 30-day extension to the schedule
4 should allow the parties time to obtain those
5 documents. We realize we're putting ourselves in a
6 time crunch. And we are choosing to do that because
7 we'd like to keep the schedule moving. So while we
8 would probably ask, you know, the Court may and
9 defendants may agree to something longer, we would
10 like to keep the extension brief so that we can get
11 this case to class certification. So we would like
12 those documents to be a date agreed upon for
13 production, and perhaps a slight extension of the
14 schedule.

15 THE COURT: So the primary thing here is
16 you're wanting a date by which the defendants share
17 with you the search terms they're going to use to
18 find the documents that you're wanting?

19 MR. HABERMAN: Well, more than just the
20 search terms. Sorry, go ahead.

21 MS. WEINER: And a date that they are going
22 to produce the documents yielded from those. I mean,
23 it's been about a month. So I have to believe that
24 there has been some discussion going on about how and
25 what exists and how they might find it. But

1 discovery was served. And we've been having
2 discussions about these requests for the better part
3 of 30 to 40 days.

4 MR. HABERMAN: And really, just let me add
5 one more thing, Your Honor. It's not just the search
6 terms, because we think that the search terms for
7 case relevant documents have been established long
8 ago. So it would be more just an application of
9 those search terms, especially in terms of pricing to
10 what RJRT has that's related to the case. So it
11 shouldn't be that we have to start the whole process
12 of determining, you know, what terms to even use. So
13 I would think that RJRT knows how to get us the
14 pricing documents that it has that haven't yet been
15 produced in short order. I think that's really the
16 issue here.

17 THE COURT: Well, Ms. Weiner, do you think
18 you have an agreement with the defendants about
19 what -- that they're going to produce these
20 documents? There is no dispute that they're going to
21 produce the documents that you're wanting; it's just
22 simply a matter of setting deadlines to get them? Or
23 is there a discovery dispute about whether you're
24 going to get the document in the first place?

25 MS. WEINER: I do not believe there is a

1 discovery dispute over whether we are going to get
2 the information in the first place. I think it's a
3 matter of how long it might take.

4 THE COURT: Mr. Monde is shaking his head.

5 MS. WEINER: There are a lot of discussions
6 around timing. So that leads me to believe that they
7 are willing to produce the information. I just don't
8 think we have an agreement on how long it should
9 take.

10 THE COURT: Mr. Monde is shaking his head
11 no here. So I think I'm about to hear that there is
12 a discovery dispute as to whether you're entitled to
13 these documents at all.

14 MS. WEINER: Well, Mr. Monde sent me an
15 email this morning or last night saying that, if we
16 could have a discussion about the search terms and
17 yielding the documents, that that could help in
18 shortening the timeframe. So it would be surprising
19 if we're all of a sudden talking about zero documents
20 being produced.

21 And also these discussions initiated some
22 time ago, and we discovered that RJRT has not
23 responded, and Mr. Monde and Mr. Biersteker invited
24 us to serve discovery that was, quote, duplicate on
25 RJRT.

1 So if the suggestion now is that there is a
2 disagreement as to whether documents should be
3 produced at all, we would ask for full briefing on
4 that issue, Your Honor, because I have plenty of meet
5 and confer letters that would, we believe,
6 demonstrate that's not true.

7 THE COURT: Anything else the plaintiffs
8 want to tell me before I hear from Mr. Monde?

9 MS. WEINER: Nothing further, Your Honor.

10 THE COURT: All right. Mr. Monde.

11 MR. MONDE: Yes, there is a discovery
12 dispute, Judge.

13 First of all, let's go back to when we were
14 last together. That was on October 26. Mr.
15 Schlesinger called for that hearing. And the purpose
16 was to discuss amendment to the scheduling order.
17 And Mr. Schlesinger went on at some length about how
18 he was interested in shaving eight weeks off of the
19 schedule, how he wanted to proceed quickly. He said,
20 for example, I think time is of the essence; I'm
21 willing to do anything, including Your Honor's
22 suggestion of shortening the time to get all the
23 experts done. He said he could have most of his
24 experts ready to testify, I think tomorrow is what he
25 said; then it turned out that he wanted until

1 December 10th to get all his experts together.

2 The Court before we left, as the Court, I
3 think, does on a regular basis, asks the parties if
4 there is anything else they want to present. And Mr.
5 Schlesinger, for example, suggested that he wanted to
6 take some additional fact depositions. I objected to
7 that since the fact discovery was going to close in
8 five days. And that was resolved so there would be
9 no depositions unless there was some question about
10 whether he had the right parties in front of the
11 Court, which there will not be an issue on.

12 We clearly all left that hearing
13 understanding that we needed to complete the
14 deposition of one named plaintiff, and that
15 otherwise, fact discovery was closing, and that we
16 would proceed to expert discovery with plaintiffs'
17 disclosures on December 10th. That was the clear
18 intent, that was the purpose. And Mr. Schlesinger
19 stood silent when the Court asked if there was
20 anything else, and did not disclose the apparent
21 plans to serve all of this new discovery.

22 THE COURT: Well, I haven't gone back and
23 looked at the transcript, but my memory was that Mr.
24 Schlesinger raised some issue about -- I didn't quite
25 understand it, but I'll give my impression -- was

1 that there was some issue about whether they had sued
2 the right defendant, and that they may need to do
3 discovery on that.

4 MR. MONDE: That's exactly right. In other
5 words, he wanted to take some depositions to
6 determine, or confirm I suppose, that he had the
7 right defendants in front of the court. And Your
8 Honor said, in essence, Listen, I think, based on
9 what I know, you do have the right parties. But, of
10 course, if the defendants later on contend that you
11 don't have the right defendants, you're going to be
12 liberal -- is the word you used -- in allowing
13 discovery on that issue.

14 Let me be clear, this new written discovery
15 is totally unrelated to that issue, has nothing to do
16 with it. So your recollection is right, but
17 different --

18 THE COURT: This issue wasn't raised in
19 anything Mr. Schlesinger said?

20 MR. MONDE: No, sir, not at all.

21 Now, as Ms. Weiner stated, the issue really
22 goes back to discovery requests that the plaintiff
23 served on Santa Fe and on RAI back in July of 2016.
24 And we responded by saying, Look, RAI will respond on
25 its behalf, Santa Fe will respond on its behalf, and

1 we assume that the plaintiffs will serve document
2 requests to R.J. Reynolds. We weren't playing --
3 doing that for the sake of making them work, Judge.

4 The reason we did that was that because the
5 proportionality burdens on these different companies
6 would vary tremendously. Santa Fe only makes Natural
7 American Spirit, so a lot of the documents would
8 be -- search terms would be relevant because of that.

9 RAI is not even an operating company, so it
10 had a limited universe of documents.

11 Reynolds Tobacco makes dozens of different
12 brands, none of which are Natural American Spirit.

13 So proportionality was an important reason
14 why we laid down that marker.

15 Regardless of any confusion or difference
16 of the minds, on August 20, there was no confusion at
17 all. At that deposition, the Court recalls, we had
18 the hiccup over predictive coding, and we made
19 available a designee to talk about those issues. As
20 part of that deposition the designee testified that
21 as part of Santa Fe's production, it had certain
22 employees of Reynolds Tobacco that did work for Santa
23 Fe under a services agreement. And those documents
24 were produced as part of Santa Fe's production.

25 But that Reynolds Tobacco, because it had

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1 never received a document request to it, had never
2 gone back and done some comprehensive search of all
3 of its files.

4 THE COURT: So if I'm understanding
5 things -- and correct me if I'm wrong -- the critical
6 component is that Ms. Weiner is saying that somebody
7 from the defendants said they will produce all
8 documents from all corporations. And you're saying
9 that representation was never made?

10 MR. MONDE: That is correct. The document
11 responses at the time -- and I have a notebook of
12 them all so the Court can see them -- they each state
13 that each defendant will respond on its own behalf.
14 They each state our assumption that the plaintiffs
15 would serve a document request on Reynolds Tobacco.
16 That never happened. And --

17 THE COURT: So would you have been
18 representing R.J. Reynolds?

19 MR. MONDE: Yes, sir.

20 THE COURT: Okay. So you were saying you
21 got to serve them because you may raise different --

22 MR. MONDE: We most certainly would
23 raise --

24 THE COURT: -- objections to those?

25 MR. MONDE: Yes. And, you know, with the

1 amendment to the rules in terms of responses to
2 written discovery, I can tell Your Honor that we
3 spent a tremendous amount of time complying with both
4 the letter and the spirit of those, in terms of
5 describing exactly what we would produce, and where
6 we were drawing the lines, timelines for when we
7 would do that. And there has never been a motion to
8 compel on those, and there is a good reason why, is
9 because we did what we needed to do up front. But
10 the responses of Reynolds Tobacco would have been
11 very different.

12 But here's the point, in terms of the
13 timeliness: There is no dispute that, by August
14 20th, the plaintiffs knew what they now know, and yet
15 they did nothing. They did nothing --

16 THE COURT: Refresh my memory. What's the
17 significance of August 20th?

18 MR. MONDE: That was the date that they
19 deposed our document designee. And Ms. Weiner, in
20 fact, told the Court, and conceded that they learned
21 on August 20th that they needed to serve document
22 requests on R.J. Reynolds Tobacco, and they didn't.
23 They waited nine weeks, and they could have served it
24 timely, but didn't.

25 But then we come to the hearing. And the

1 whole purpose of the hearing was to discuss the
2 discovery that was needed so that the Court could
3 then enter an amended scheduling order that allowed
4 for completion of fact discovery, and then we could
5 go to expert discovery. And the plaintiffs never
6 raised this issue.

7 And we flew home. Mr. Schultz walked back
8 to his office, he didn't fly home. And the next
9 Monday we were stunned to get all of these new
10 discovery requests.

11 THE COURT: And how far away were we from
12 the discovery deadline?

13 MR. MONDE: Two days.

14 THE COURT: Two days.

15 MR. MONDE: Two days.

16 And so not only is it the practice -- I
17 mean, we all know when practicing in federal courts
18 what the rule is and the standard operating procedure
19 is: You need to serve your discovery so that the
20 responses are due within in the deadline.

21 But there is no explanation or reason or
22 good cause for them having delayed from August 20th
23 until October 29th to serve this discovery. So it's
24 untimely, and even more so under the circumstances of
25 this case.

1 In fact, it's just inherently contradictory
2 from everything that Mr. Schlesinger told the Court.
3 He was: Let's hurry up, let's finish the fact
4 discovery, let's get to experts. Remember, he wanted
5 to do the experts November 1st. And then he decided,
6 no, he couldn't get all of them done by then, so we
7 would go back to December 10th as the date.

8 To then turn around and serve all this new
9 discovery and to react as if this was something that
10 we could respond to immediately, it's inconsistent
11 with their whole position. They really need --

12 THE COURT: So what do you want to do?
13 What do the defendants want to do? And what do they
14 not want to do?

15 MR. MONDE: Well, number one, we want the
16 discovery stricken. It's untimely. Now it is true
17 that -- first of all, our responses are not even due
18 until December 14. So that would be after the
19 current expert discovery deadline.

20 THE COURT: Well, if they were to, say,
21 extend the discovery 30 days to allow this discovery,
22 and move everything back, what would your reaction to
23 that be, or response?

24 MR. MONDE: The reaction is this: The only
25 way -- first of all, I can't represent to this Court

1 how quickly it would take to use these search terms.
2 There is 300 of them, Judge.

3 THE COURT: Search terms?

4 MR. MONDE: Yes. And there are some very
5 common terms. I mean: Consumer, customer, market
6 share.

7 THE COURT: Let me make sure I understand.
8 Have they sent you these search terms, or are these
9 ones that you're proposing to use?

10 MR. MONDE: They sent them to us and we
11 agreed to use them vis-a-vis the discovery directed
12 to Santa Fe and to RAI.

13 But here's the other thing: It was always
14 understood, and it's agreed, that once a document had
15 a hit on a search term, the defendants would then,
16 each individual defendant, would then review it for
17 terms of relevancy, whether it was responsive to the
18 document request, and within the scope of what the
19 defendants committed to produce, and of course,
20 whether it was privileged.

21 To do that now for all the documents that
22 the plaintiffs have sought, even if just limited to
23 pricing, would take months and months to do. It
24 is -- I can only imagine that counsel on the phone
25 have not been on the other side of this, needing to

1 coordinate and oversee a document production of a
2 large company using these search terms. I mean, it
3 is not a simple process.

4 And in fact, I wanted to come here today
5 with a bit more than just saying: It's going to take
6 us a long time. And so I have had our document
7 people do some sampling of the -- to try to get a
8 handle on the scope of work involved. There was one
9 population of emails that was used, and then we ran
10 the search terms against them. 993,000 emails were
11 hit with at least one search term. This team then
12 reviewed 31,000 of those. Four were identified as
13 potentially responsive. Two have already been
14 produced as duplicates, as part of the Santa Fe
15 production; in other words, it's just a duplicate
16 document. The remaining two included -- were
17 identified as potentially responsive only because
18 they included as an attachment a PowerPoint. And the
19 plaintiffs have that PowerPoint. That, too, was
20 produced by Santa Fe. So --

21 THE COURT: Well, let's say Ms. Weiner in a
22 moment says: Fine. But the discovery is so critical
23 to us on class certification, we'll take the hit,
24 we'll extend it, you know, to whatever is necessary
25 to get the documents. What would be your response to

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1 that?

2 MR. MONDE: Well, that would be a different
3 position than they've taken previously up to this
4 point. Because up to this point, it was: We want
5 all the documents, and we are not going to move the
6 discovery schedule. If -- and again, this is limited
7 to pricing documents. And this is frustrating,
8 Judge, because they have gotten a huge production of
9 documents on the pricing issue, and on the pricing
10 issue specifically.

11 But if the requests were limited to
12 pricing, and they withdrew the rest of the discovery,
13 and if they were willing to sit down soon with their
14 technical people and our technical people, and we
15 agree on a set of search terms that will produce a
16 manageable population of documents, and we agree on
17 where they will search; in other words, what --
18 imagine back in the old days when we started, I mean,
19 you'd go through 100 file drawers looking for
20 responsive documents; certain drawers you could skip
21 because it was labeled in a way that you couldn't
22 reasonably expect to find responsive documents there.
23 It's really the same now with these electronic share
24 points and home drives. Some, by definition, relate
25 to other products. In fact, the vast majority do,

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1 because, again, we're talking about Reynolds Tobacco
2 now, and Reynolds doesn't make Santa Fe, or Natural
3 American Spirit.

4 But if we sat down and reached agreement on
5 a narrowed set of search terms, and where we were
6 going to search, and we then had an opportunity to
7 give the Court a projection of how long it would take
8 us to do that -- the plaintiffs would share in the
9 cost of that, but is it feasible to do? Yes. But
10 only under those kinds of limitations.

11 THE COURT: Why are you saying you'd be
12 willing to go forward on the pricing, but not on
13 their other requests?

14 MR. MONDE: Because that was what they
15 prioritized just now, and in their discussions with
16 me. They have, for whatever reason -- and they don't
17 have to share it -- decided that the pricing
18 documents are the most important. And that's what
19 counsel represented to the Court today. So that's
20 the only reason that I'm going off of that, because
21 that's what they seem to be most concerned with. And
22 in an effort to resolve this, we're willing to do
23 that. Here, the Court said, usually defendants are
24 willing to just delay, delay.

25 Remember when we first got together in May

1 of 2016, and you remarked it was a bit unique because
2 the defendants' proposed scheduling order was in some
3 places quicker, shorter than the plaintiffs'.

4 Judge, we have experts lined up, okay?
5 We've been trying to get ready to do response expert
6 reports. We've got these people lined up. We've got
7 schedules blocked off. And so there is prejudice to
8 us in terms of these continuing delays, especially
9 under these circumstances.

10 But we want to get to the merits. And if
11 this is what it takes to get to the merits in a way
12 that satisfies the plaintiffs, then we're willing to
13 do that, but under those provisions: That it's
14 pricing; that they sit down with us, we agree on
15 search terms; agree on where exactly we're going to
16 be looking; and then we give you a projection of
17 time, and we amend all the dates accordingly.

18 THE COURT: All right. Anything else, Mr.
19 Monde?

20 MR. MONDE: Not right now, Judge.

21 THE COURT: All right. Thank you, Mr.
22 Monde.

23 Ms. Weiner, I'll give you another chance to
24 talk, but let me ask -- let me give you my
25 impression, is that the defendant probably has you

1 over the barrel to some extent, in that unless you've
2 really got a smoking gun memo or letter or something
3 like that, you probably were obligated to serve
4 discovery on R.J. Reynolds, and can't rely upon the
5 fact that they were going to produce, in your mind,
6 documents from R.J. Reynolds. So I guess I'm
7 inclined to think that they've got you over a barrel.
8 And either I just don't allow that discovery to go
9 forward because of its untimely nature, or if you
10 think it is so important to your class certification
11 hearing, and I -- you know, I'm not sure I am in a
12 position, from what I've read or written or anything
13 else, to really make that determination. So that's
14 got to be your determination, I think. But if you
15 want it, I'm going to have to slide this schedule to
16 accommodate the defendants' needs to produce this
17 material. So I don't think -- it doesn't sound like
18 the defendants can produce the material that you're
19 wanting and also keep the schedule.

20 So I guess my question to you: Do you want
21 those documents and us keep the schedule, or do you
22 want to -- and us slide the schedule and slide it,
23 I'm afraid significantly? Or do you want to forego
24 this discovery and keep the schedule?

25 MS. WEINER: Your Honor, I'd first like to

1 respond just on the merits as to whether RJRT has an
2 obligation to respond to this discovery. We believe
3 that the case law requires RJRT to have responded to
4 the discovery as a subsidiary.

5 Certainly, there is a dispute. Mr. Monde's
6 representation of what the responses to the requests
7 for production state on behalf of RAI is certainly --
8 there is no meeting of the minds there. We believe
9 it states that RJRT was going to be producing
10 information, and that, quote, duplicate requests
11 weren't necessary. The suggestion that they were
12 shocked that they received these duplicate requests
13 is surprising to me, because we had ongoing meet and
14 confer letters back and forth between counsel, not
15 all of which are before the Court.

16 An October 5, 2018, letter where they,
17 quote, invited us to serve these duplicate requests,
18 any responses would have been due 45 days later. So
19 there are many places in the correspondence between
20 counsel, and emails as recent as today, where we
21 believe there is an agreement to produce this
22 information.

23 And, Your Honor, so the Court has a full
24 picture, this is not an isolated discovery. The
25 reason this was discovered was because we had a

1 deposition in August relating to the overall document
2 production by all defendants in this case because
3 there was a massive predictive coding error that
4 resulted in the late production, after all deadlines,
5 by defendants of hundreds of thousands of documents
6 that the plaintiffs were pummeled with, frankly,
7 unsuspectingly. So this has not been a, well,
8 plaintiffs are sitting back and kind of twiddling
9 their thumbs not serving discovery timely. We've
10 been dealing with many other discovery issues in the
11 background here, which is how we discovered this
12 issue in the first place.

13 So if the Court is inclined to strike the
14 discovery, we would like to put full briefing before
15 the Court on a motion to compel. Because while we
16 have agreed to limit the request for class
17 certification to the pricing documents, which in our
18 belief are pretty limited, and we could probably talk
19 about what they look like and what we believe we
20 need, that does not require running 300 search terms
21 across a massive database of documents and email
22 custodians.

23 It has been since at least September 21
24 that we put defendants on notice of the belief that
25 they were obligated to respond to discovery. So

1 there is no surprise here that we are before the
2 Court on this issue.

3 Also, I am having trouble simply agreeing
4 to just push -- while these documents are important
5 and we do need them, I don't think that it should be
6 on some: Well, we can't figure out how long it's
7 going to take, we're not sure. We've been hearing
8 that for the last 30 to 45 days.

9 And I have been on the other side of
10 documentation productions to know that limiting the
11 request in this way under the time tables we've been
12 talking about, it shouldn't take many more months to
13 receive the pricing documents that we've limited in
14 the request.

15 So we do think that the information is
16 important for class certification. We think that
17 there is an obligation to respond to all of the
18 discovery. And we agreed to allow that to proceed
19 after the experts' disclosures, such that that
20 material could be used at a later date, like at
21 trial, if necessary.

22 So we don't waive the production of all the
23 RJRT materials. We think that the defendants are
24 delaying this process. Ms. Bevel reached out
25 multiple times to Mr. Monde in response to the status

1 report that was filed with the Court. I reached out
2 to Mr. Monde to try to schedule a hearing before the
3 Court. And this just continued to delay.

4 So plaintiffs are not delaying. We are not
5 failing to serve requests. We want that information.
6 We believe we're entitled to it, but not in some, you
7 know, extended amount of time. We should be able to
8 agree upon search terms in the next 48 hours. And
9 it's our view that that information on the limited
10 request should, or could be produced, such that the
11 schedule only needs to be pushed out 30 to 45 days.
12 And Mr. Schultz has been telling Mr. Monde that for
13 the last at least three weeks, that that was our
14 position. And that continues to be our position
15 today.

16 THE COURT: All right. Well, this is what
17 we're going to do. I'll start getting us on a path
18 here. I think the plaintiffs are a bit schizophrenic
19 on this, in the sense that they're saying the
20 documents were promised, and then they're sending
21 discovery two to three days before the discovery
22 deadline. I mean, to me, that looks like a
23 concession that they need to request it. I know that
24 you're saying not. But in any case, I won't strike
25 it. I never know what striking from CM/ECF is

1 anyway. So I'm not going to strike anything. But
2 call it a protective order or whatever, the
3 defendants do not have to respond to the discovery
4 that was served shortly before the deadline. It's
5 untimely.

6 Now, I will extend the time to get those
7 documents in your hands, the pricing documents. If I
8 understand the plaintiffs' position, they're willing
9 to forego the rest of it for the merits discovery,
10 but they want the pricing documents for class
11 certification. If that's the case, let's put the
12 other request to the side. And I will extend, then,
13 the deadlines to get the pricing documents, if you
14 want me to, Ms. Weiner. I'll give you the choice.
15 You can live with what's right now, where I'm not
16 requiring the defendants to produce, or I can extend
17 the deadlines, start working with you to put new
18 deadlines in place, to then get the pricing documents
19 in your hands. What do you prefer?

20 MS. WEINER: We would like the pricing
21 documents, and we would like an extension of no more
22 than 30 to 45 days to accomplish those limited
23 requests.

24 THE COURT: Well, if I go down the path of
25 extending deadlines, I'm going to probably use my own

1 judgment to figure out how to make it work. So
2 you'll have to make a decision. You'll have to buy a
3 little bit of a pig in a poke here, and you'll have
4 to decide whether we're going to extend the deadline
5 for you to get the pricing documents, or we'll just
6 shut it down and go with what we've got.

7 MS. WEINER: I think we need the documents
8 as requested. I mean, we believe we're entitled to
9 all the information. We prioritized those requests.
10 I am nervous to just agree to a blanket extension
11 without understanding what that looks like. Because
12 there is significant prejudice that we've already --
13 you know, document discovery issues that we've
14 already experienced, we've already been prejudiced
15 more than the Court is even aware at this point.

16 THE COURT: All right. Let's do this: what
17 is the -- tell me what the first thing that needs to
18 take place if we're about to have an extension. What
19 is the first thing that needs to take place?

20 Let me ask Mr. Monde this question, and
21 then I'll let you react to it, Ms. Weiner.

22 What's the first thing that needs to take
23 place if we're going to produce the --

24 MR. MONDE: -- the pricing documents.

25 THE COURT: -- the pricing documents?

1 MR. MONDE: The first step, Judge, would be
2 a meeting -- certainly can happen by phone -- between
3 technical folks on the plaintiffs' side and technical
4 folks on the defense side, to agree on a limited set
5 of search terms.

6 And another context, Judge, they have what
7 they call these restricter terms; so, in other words,
8 for a document to be a hit, it both has to have one
9 of the search terms, and it must include one of these
10 other restricter terms. That could come into play
11 here. So, for example, as I was saying, Reynolds
12 Tobacco makes a lot of different brands. If there
13 was a restricter term that just said Natural American
14 Spirit or NAS, that could help.

15 Anyway, to answer your question, a meeting.

16 THE COURT: And how quickly could
17 defendants be ready for that meeting?

18 MR. MONDE: I'll commit to have someone
19 available no later than seven days from tomorrow.

20 THE COURT: All right. Do you agree,
21 Ms. Weiner, that the next thing that needs to take
22 place is a meeting between the plaintiffs' and the
23 defendants' technical people to discuss these search
24 terms?

25 MS. WEINER: I don't know that I agree that

1 it needs -- David, I guess I'm not sure if you mean
2 technical people like people like attorneys in your
3 office who handle the document production, or if you
4 mean like your vendor.

5 THE COURT: Well, I guess what I'm
6 thinking -- and Mr. Monde can use his own terms --
7 but my experience has been: You better have somebody
8 there that knows how this software works, and is
9 probably going to run the system or oversee it for
10 the production of this. So you have the two IT
11 people talk directly to each other, or across the
12 table or on a phone, so that we don't have attorneys
13 who do not understand everything that is involved
14 with the software, it being filtered. So we just
15 have direct conversations between the two IT people.

16 MS. WEINER: And I'm happy to have my IT
17 vendor involved. However, what I believe the first
18 step in this process is -- and I'm fine with seven
19 days for Mr. Monde to produce or send in an email to
20 plaintiffs, the search terms. The vendors aren't
21 going to know what the search terms are. They don't
22 understand the substance of the case. They
23 understand the technical aspect of the searching.
24 But they need to be given the substantive search
25 terms that will yield the documents that are

1 responsive to the request. Then we can get the
2 technical people involved to talk about how do we
3 narrow the request, how do we make sure there is
4 nothing duplicative. So I agree that the technical
5 people are a part of discussion. But before we have
6 that call in seven days, we'd like a list of search
7 terms from defense counsel that they believe will
8 yield the documents, the pricing documents. And that
9 can be probably a subset of what we've already agreed
10 to in the 300.

11 MR. MONDE: Judge, if I may, there is an
12 agreed set of 300 terms.

13 THE COURT: You've already sent them over.

14 MR. MONDE: They sent them over. We said
15 okay.

16 THE COURT: Let me ask Ms. Weiner this:
17 Given that there is already 300 out, and you sent
18 them over and they said okay, what more do the
19 attorneys need to do?

20 MR. MONDE: Narrow the list.

21 MS. WEINER: We don't need to run the 300.
22 I think David's point was running the 300 yields a
23 huge amount of documents. We're now just talking
24 about a very narrow set of pricing documents. So if
25 you search "consumer," that's probably not going to

1 be the best search term, if we're trying to get
2 pricing documents to hit out of the database. So,
3 based on the terms that are used within the
4 defendants' databases -- you know, all companies have
5 different verbiage that they use for pricing
6 documents, and they call the corp by subnames -- the
7 defendants, in consultation with their clients,
8 should be able to cherry pick the search terms out of
9 that 300 that will yield responsive documents as to
10 pricing, and not all of the other stuff that was
11 produced as part of this overall document production,
12 if that makes sense.

13 I don't think we need the 300 is my point.
14 I think we could probably use a more limited set of
15 search terms. Or in fact, maybe the pricing
16 documents we're asking for are kept in certain
17 folders that we can limit the overall -- I don't
18 know, because I'm not privilege to that information,
19 but I'm guessing we can do a more technical, limited
20 search for specifically pricing documents, and not
21 across all databases.

22 MR. MONDE: Judge, I agree with that.

23 We're making this too complicated. There
24 are two pricing terms in the set of 300. She wants
25 my proposal. I don't need seven days. I'll give it

1 to her right now. Pricing/analysis and
2 pricing/study. Those are the two pricing terms. If
3 they have more that they want to add, we'll consider
4 those and discuss them. She's quite right that we
5 also need to discuss which of the file boxes --
6 they're electronic, of course -- but which of the
7 file boxes we're going to look in, and then the
8 search process can go underway.

9 But the Court is quite right. It's great
10 for the attorneys to agree on the terms. But without
11 the involvement and consensus of the technical people
12 that are going to do the work, problems and delays
13 result. That's the only reason that I suggested
14 technical people in the first place. I didn't mean
15 to exclude attorneys.

16 But there you go: That's my solution to
17 get to the pricing issues. If the plaintiffs have
18 additional terms that they want to suggest, they can
19 send them over. Let's get a meeting in the next
20 seven days to finalize that, and to agree on the
21 various electronic folders that will be searched.
22 There are some that do relate to pricing, and so it
23 would make sense, from our standpoint, to confine it
24 to that. And that's how we ought to proceed.

25 So that's step one.

1 THE COURT: All right. Well, let's have
2 this meeting between the IT people by the end of
3 business next Wednesday, the 5th, so by the end of
4 business on December 5 have your meeting with the IT.
5 Lawyers can certainly be present. I'm not suggesting
6 that we kick them out of the room. Y'all can be
7 present. But let the IT people talk to each other.
8 Don't insist on everything coming out of the
9 attorneys' mouth. Sit there and let them talk, and
10 see if they can resolve all the technical
11 difficulties. But let's set that deadline.

12 What's the next deadline, Mr. Monde?

13 MR. MONDE: Step two, Judge: Please give
14 us -- let's see, the 15th is on a weekend. I think
15 it's the 17th is a Monday, give us to the 17th. I'm
16 really talking out of school, because the technical
17 people really ought to be weighing in. I want to set
18 a deadline for our coming back to the Court and to
19 the plaintiffs and saying: Okay, we've got agreement
20 on what's going to be searched, here is our good
21 faith estimate of how long it will take to do this,
22 and to produce the material, including reviewing it
23 for relevance, privilege, and the other things that
24 you have to review. Even with a limited set of
25 documents, that takes time. But the Court needs that

1 date, because that, of course, will then inform how
2 much of a slide of the schedule is needed.

3 THE COURT: So this is a date shortly after
4 the IT meeting, which basically then the defendants
5 are going to tell us how long it's going to take them
6 to produce --

7 MR. MONDE: Yes, sir, that's exactly right.

8 THE COURT: How long do you think -- you've
9 probably had some conversations with your IT people.
10 What are they telling you?

11 MR. MONDE: Well, that it's not nearly as
12 quick and as simple as the plaintiffs would like to
13 believe that it is, number one. I hear that every
14 day.

15 I'm going to commit, without having spoken
16 to them that -- give us until the 19th, Judge.

17 THE COURT: Just to come up with the length
18 of time?

19 MR. MONDE: The projection, yes.

20 THE COURT: But you don't have any
21 projections from them how long this is going to take?

22 MR. MONDE: No, Judge, and here's why: The
23 answer -- I mean, I don't want to be cute about
24 this -- the answer depends on how many documents are
25 hit with the search terms that need to be manually

1 reviewed.

2 THE COURT: Well, before you come back to
3 the Court, are they going to run these search terms?

4 MR. MONDE: Yes, sir.

5 THE COURT: Just not review the documents?

6 MR. MONDE: Yes, sir. And we're going to
7 tell you that we've got 1,000 hits, 10,000 hits,
8 100,000, a million.

9 And then what they can say and they're very
10 good at is saying: Okay, if we've got 500,000 or
11 50,000 emails -- of course many of them have
12 attachments -- but they can make good educated
13 working assumptions: It will take us this amount of
14 time. So once we determine the number of documents
15 that are hit by the search term process and that now
16 need to go into the queue for manual review, at that
17 point they can give me and I can give the Court and
18 the plaintiffs a good faith estimate of how long it
19 will take us.

20 But that takes time to develop, which is
21 why I suggested the 19th.

22 THE COURT: And the 17th being a Tuesday?
23 No, that's a Monday.

24 MS. WEINER: Your Honor, might I respond
25 really briefly before we set the 17th?

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1 THE COURT: Yes.

2 MS. WEINER: So in our view, we can agree
3 upon search terms. We can send over proposed search
4 terms by the end of the week. We should be able to
5 get agreement on those search terms in the next seven
6 days. This is a limited set of requests. And it
7 will be more than two search terms. We will have to
8 be where we are searching, which the technical people
9 can discuss in the meeting next week. But we will
10 have agreement on those search terms in the next
11 seven days.

12 I have done this on the other side, and I
13 don't think that it takes that long to come up with
14 search terms.

15 THE COURT: I don't think Mr. Monde is
16 disagreeing with that.

17 MR. MONDE: I've agreed with that.

18 THE COURT: Yeah, you've won that one.

19 MS. WEINER: Agreeing on the search terms
20 by the meeting next Wednesday?

21 MR. MONDE: Well, I mean, that's the
22 purpose of the meeting. I mean, if we can't reach
23 agreement then, or shortly thereafter -- the
24 defendants are going to do everything in their power
25 to avoid coming back to the Court again to decide a

1 dispute about search terms.

2 THE COURT: Well, it seems to me,
3 Ms. Weiner, that the search terms are -- if I hear
4 Mr. Monde -- are largely under your control. He's
5 proposed two. And he says if you add some. I mean,
6 I guess they've agreed to 300. So if you agree to
7 three more --

8 MR. MONDE: Let me be clear.

9 MS. WEINER: We don't agree that it's under
10 our control. I mean, under the discovery rules, we
11 believe it's their burden. But I will come up with
12 the search terms for the sake of saving time in this
13 process. Because they know what search terms will
14 yield the right documents. We don't know as well as
15 they know. But we will come up with a set of search
16 terms. David, you can expect that by the end of the
17 week.

18 Judge, to the extent that Your Honor's
19 calendar allows it, I'd like to come back sooner than
20 the 17th. We're just going to be running up into the
21 holidays. And I don't know, David, that it will take
22 that long to run the search terms across the database
23 to find out how many documents we're dealing with
24 here.

25 THE COURT: Well, let's do this: I mean,

1 I'm receptive, Ms. Weiner, to a suggestion as to an
2 earlier date by which the defendants tell us how long
3 it's going to take them to produce the pricing
4 documents with these search terms. What would be
5 your proposal, if it's not the 17th?

6 MR. HABERMAN: Perhaps sometime in the week
7 of December 10th, just a few days before that, just
8 so that we have a full idea of how long it will take
9 to get the documents so we come up with a concrete
10 schedule so that this is, you know, the ultimate time
11 that we do that.

12 THE COURT: Go ahead. Mr. Monde.

13 MR. MONDE: May I, Judge? Let me offer
14 this suggestion: December 5th will be the date by
15 which the plaintiffs will have sent us their proposed
16 additional search terms, and that we have a meeting
17 of the people that will be involved. That meeting
18 may or may not produce on that day an agreement to
19 the search term list. Let's set the 10th as the
20 deadline for an agreement, or the parties need to
21 come back to the Court.

22 THE COURT: And what's the agreement on?

23 MR. MONDE: The search terms. So I've
24 suggested two. It sounds like Ms. Weiner is going to
25 suggest a few more.

1 THE COURT: I guess I was under the
2 impression that the December 5th date was sort of a
3 deadline by which we were going to have an agreement
4 on the search terms.

5 MR. MONDE: That was the deadline for the
6 parties to get together and meet. Hopefully,
7 agreement can be reached at that meeting. But I
8 mean, I'm operating in the vacuum in speaking on
9 behalf of technical people. If they were to suggest
10 two more terms, Judge, then I think we're likely to
11 be able to reach agreement that day. If they suggest
12 20 or 200 more terms, we're not going to have
13 agreement.

14 But it's not just the number of terms,
15 Judge. It can be the generality or the specificity
16 of them. And there may be some terms that our folks
17 might want to run samples on in order to determine
18 whether you get a lot of false hits or not. The more
19 false hits you get, that is the more hits you get on
20 documents that on their face have nothing to do with
21 this, the more we get prejudiced.

22 THE COURT: Let me ask: Who was it that
23 was speaking -- it wasn't Ms. Weiner that was
24 speaking there at the end? Who was that speaking?

25 MR. HABERMAN: Jeffrey Haberman, Judge.

1 THE COURT: Okay. What were you suggesting
2 the December 10th date for? The same thing as Mr.
3 Monde is suggesting, or were you using December 10th
4 as a different deadline?

5 MR. HABERMAN: What I'm suggesting is, in
6 the week of December 3rd, so, like let's say by that
7 Wednesday, the 5th, we come to an agreement on the
8 search terms. And then the following week, in that
9 week of December 10th, the defendant tells us how
10 long it will take to get us the responsive material.

11 THE COURT: Well, what if I did this:
12 Let's do December 5th you've got to have both your IT
13 meeting and you've got to have an agreement on the
14 search terms. If you don't, I need to know that
15 sooner rather than later. So let's just -- if you
16 can't reach agreement, call me, and I'll try to make
17 myself available. And then let's use -- how about
18 December 12th -- is that a Friday?

19 THE CLERK: It's a Wednesday.

20 MR. MONDE: It's a week, though, Judge. If
21 my folks have a week to run samples on the agreed
22 search terms, they can give us a good projection
23 within a week. So whatever that day is, that's fine,
24 Judge.

25 THE COURT: When you say "that day," what

1 are you --

2 MR. MONDE: The 12th, a week later.

3 THE COURT: All right. So December 12th is
4 going to be the date that the defendants get back
5 with us as to how long it is now going to take, using
6 the search terms, to produce, then, the pricing
7 documents.

8 MR. MONDE: That's right, with the
9 understanding that the first step is whether a
10 document hits the search terms. But then they have
11 to be reviewed for privilege and whatnot. That's
12 exactly right.

13 THE COURT: All right. So now, what other
14 deadlines are you proposing, Mr. Monde?

15 MR. MONDE: I think that until we get that
16 projection, Judge, we can't in an informed way set
17 additional deadlines. Once we get that projection,
18 then we can go ahead and pull the scheduling order
19 back out and say, Okay, plaintiffs' expert disclosure
20 on this day -- I mean, it will be easy enough to do,
21 because the only, you know, the only date that needs
22 to be set after we agree on how long it's going to
23 take to produce these pricing documents, is the
24 plaintiffs' expert disclosure. We'll set that date,
25 and then all the other dates will follow.

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1 Remember last month, at the hearing last
2 month, the Court set a plaintiffs' disclosure
3 deadline, and then three months later, I think it
4 was, a defense deadline. And then the plaintiffs had
5 two weeks after that to decide if they were going to
6 waive rebuttal or not. So we can keep that
7 structure. And all we need to do -- and we can --
8 you know, we ought to be able to do it by agreement.
9 But we'll know shortly after the 12th what these new
10 dates should be.

11 THE COURT: What if I tell Ms. Weiner that,
12 if she gets that information on the 12th, and she
13 doesn't like it, she is free to then just say: I'm
14 going to keep the original schedule, and not go with
15 these pricing documents?

16 MR. MONDE: That's acceptable.

17 THE COURT: All right. Hold on.

18 MS. WEINER: I heard you, Your Honor. But
19 I think the issue with that is that the current
20 expert disclosure deadline is on the 10th. And so we
21 won't know on the 10th what we learn on the 12th. So
22 I think we need to adjust that number ever so
23 slightly, so we can make that decision on the 12th.

24 MR. MONDE: Judge, you already did that.

25 THE COURT: Well, December 10th is what?

1 MR. MONDE: That's the current deadline.

2 MS. WEINER: For experts.

3 MR. MONDE: That's the current deadline for
4 plaintiffs' expert disclosure. The choice the Court
5 gave the plaintiffs was keep the current schedule,
6 your discovery is untimely, or I'll allow this
7 pricing discovery, and we're going to need to slide
8 the schedule. I mean, the Court has said that
9 several times already. I don't understand where the
10 disconnect --

11 MS. WEINER: David, what the Judge just
12 asked me, if you tell me on the 12th that you need a
13 year to produce this information, we might very well
14 say we don't want it. So at that point, we might be,
15 quote, keeping the schedule as is. However, our
16 current experts disclosure deadline is two days
17 before the 12th. So I think we need two days to
18 extend the expert disclosure deadline ever so
19 slightly, in case we learn on the 12th, you know,
20 even if it's by a week or two, so that we can assess
21 what we learn on the 12th, and determine whether we
22 would like to move forward with an extension, or if
23 we think that that extension will prejudice us more
24 than not receiving the documents.

25 THE COURT: I think Mr. Monde is in

1 agreement with that.

2 MR. MONDE: Give them a week, Judge. So
3 we've got three days. On the 5th, the meeting and
4 agreement; on the 12th, the projection of the time it
5 will take; and then let's bump from the 10th to the
6 17th plaintiffs' expert disclosure deadline.

7 THE COURT: Can you work with that? Will
8 that work for you, Ms. Weiner?

9 MS. WEINER: Jeff? I'm sorry, I'm
10 conferring with my co-counsel. Jeff?

11 MR. HABERMAN: Yeah, I mean, that's fine.

12 THE COURT: All right.

13 MS. WEINER: So --

14 THE COURT: All right. It looks to me like
15 you've got something you can live with. Am I reading
16 you correctly, Ms. Weiner?

17 MS. WEINER: Yes, Your Honor. I just would
18 like clarification on one point. The other request
19 that we punted for now, to the extent that the Court
20 is not going to allow that as to merits discovery, or
21 some later date after class certification, we would
22 like to be able to brief that issue. We're fine
23 pushing those off for now, but we would ultimately
24 like to review that information. We believe we're
25 entitled to it based both on the present discussions

1 and agreement, and also the law.

2 THE COURT: Well, I'll let Mr. Monde
3 respond -- react to this, but I think all of what
4 I've done today does not preempt you from filing
5 motions to compel. If you say, Look, the Judge
6 didn't have in front of him today all these letters
7 from Mr. Monde saying he was going to make this
8 information from R.J. Reynolds available, you're
9 welcome to move to compel on that. I'm not
10 precluding that.

11 Do you agree with that, Mr. Monde?

12 MR. MONDE: I agree. They're not waiving
13 anything.

14 THE COURT: You're not waiving anything.

15 MR. MONDE: We've been relieved -- to be
16 clear, the defendants have been relieved from
17 responding to the written discovery that was served
18 on October 29th and October 31st. And that is
19 without -- and we need to produce the pricing
20 documents under the framework that we've just worked
21 through.

22 THE COURT: I guess the caveat would be, is
23 if after December 12th, we decide to extend the
24 deadlines, I guess you are responding to something
25 out there, right, something new?

1 MR. MONDE: Yes. In a technical sense,
2 there is one or two interrogatories or request to
3 produce that deal with the pricing issue.

4 THE COURT: That is what this search is
5 for, to answer that question, right?

6 MR. MONDE: Yes, sir, that's exactly right.
7 So we can modify what we've worked out here in that
8 way; that the defendants are relieved from responding
9 to all of the written discovery served on October
10 29th and 31st, except for the interrogatory directed
11 to R.J. Reynolds Tobacco focused on the pricing
12 issue.

13 THE COURT: All right.

14 MR. HABERMAN: If I could just add one
15 thing. Jeffrey Haberman. Defendants have already
16 produced a lot of pricing -- ostensibly, they
17 produced all nonprivileged pricing material they had
18 on behalf of RAI and Santa Fe. And I think
19 plaintiffs don't know how long it took RAI and Santa
20 Fe to produce that kind of pricing material. It
21 would be helpful if the defendants can tell us how
22 long it took to produce that pricing material so that
23 we have some kind of benchmark to judge how long it
24 will take them to produce the pricing material that
25 RJRT has going forward, so that we're not -- so they

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1 won't say, you know, on December 12th that it will
2 take 90 days, if it took them only 15 days or less
3 when they were producing pricing material for Santa
4 Fe. If that makes sense.

5 THE COURT: Would you be willing to produce
6 that information?

7 MR. MONDE: No. Judge, you've addressed
8 this. You've told the plaintiffs that the defendants
9 are required to give a projection to the Court and
10 the plaintiffs by December 12th. If the plaintiffs
11 are dissatisfied with that, they're free to come to
12 court. And if I tell you it's a year, and I don't
13 have a basis for that, I expect I'm going to suffer
14 the consequences of that.

15 THE COURT: Well, but wouldn't it be
16 helpful to the Court and to the plaintiffs, by which
17 to judge this new projection, how long it took to do
18 the same search at Santa Fe and RAI?

19 MR. MONDE: It's not the specifics of the
20 search, Judge. Again, it's the number of documents
21 that need to be manually reviewed for relevance,
22 responsiveness, and privilege. And when we --

23 THE COURT: But that's going to be built
24 into your projection.

25 MR. MONDE: That's going to be the whole

1 premises, the whole building --

2 THE COURT: Well, I think this is something
3 you probably ought to produce. I think you need to
4 give them how long it took.

5 MR. MONDE: We didn't track it that way,
6 Judge. I mean, we didn't track how long it took to
7 produce one category of document versus another. We
8 did --

9 THE COURT: Well, give them the best you
10 can. I think it would be helpful to the Court to
11 know that, and I think it would be helpful to the
12 plaintiffs so that we know --

13 MR. MONDE: We will.

14 THE COURT: -- because, I mean, I've got to
15 think ways to put downward pressure on the length of
16 time it's going to take to produce this stuff. And
17 it seems to me some guidance from the defendants as
18 to how long it took the other --

19 MR. MONDE: I just want to be clear about
20 what data we will share. And what we will share is,
21 when we had to, in the past, review -- I'm just going
22 to pick a number out of the air -- 200,000 emails
23 with attachments, it took us X days. We will
24 obviously share that.

25 What I can't do is say that we had 200,000

1 pricing documents, and it took us this long; 200,000
2 consumer marketing documents, and it took us this
3 long. We didn't track it that way.

4 But when we come to the Court and to the
5 plaintiffs with our position that there are X
6 documents that have been hit with the agreed upon
7 search terms, and it's going to take us Y days to go
8 through those and produce them, that Y will be based
9 on data that we will share based on past experience
10 in this case.

11 THE COURT: You can't give what you don't
12 have. But give what you have.

13 MR. MONDE: Yes, sir.

14 THE COURT: So we have as robust a
15 discussion as we can.

16 All right. From the defendants'
17 standpoint, anything else we need to set or do today?

18 MR. MONDE: No. But, you know, I
19 understand the Court wants to keep us honest and
20 apply downward pressure on the time. But again, I
21 just want to be clear, these are requests that could
22 have and should have been made long ago, okay? So
23 when the Court's thinking in those terms, please
24 consider the full context. Something I probably
25 didn't need to say, but other than that I have

1 nothing further.

2 THE COURT: Let me ask this: Do you think
3 that I need to set up a time sometime after the 19th
4 for us to get back together to see where we are?

5 MR. MONDE: Judge, the Court is busy. Let
6 the parties come to you and say we're have a problem
7 or not. You know, some of these status -- you know,
8 the plaintiffs asked for those bi-monthly status
9 conferences; we ended up canceling nine out of ten of
10 them. It blocks the Court's calendar. If there is a
11 problem, we'll contact the Court.

12 THE COURT: Are you thinking that if we do
13 extend these deadlines that y'all will be submitting
14 to me an agreed stipulated order extending them?

15 MR. MONDE: Yes. The way I envision it is
16 this: Let's suppose -- and again, this is for
17 purposes of argument -- that the projection is 90
18 days. What we will then do is, say, okay, December
19 17th, whatever it is, move 90 days out, and make
20 plaintiffs' expert disclosure due a certain amount of
21 time after they get the documents. I mean, in
22 fairness to them, they need a certain amount of time
23 with the documents before they disclose their
24 experts. That's fair. And they can tell us how much
25 time they need, whether it is 30 days, 45, 60. But

1 we will start with that 90. We'll ask plaintiffs how
2 much time they want with the documents, and then that
3 date out there will be the plaintiffs' disclosure
4 deadline. And then we'll just pick up the sequencing
5 from the other dates.

6 THE COURT: But if I don't hear from you,
7 you're envisioning me getting a new scheduling order?

8 MR. MONDE: Yes, sir.

9 THE COURT: Everything has been worked out?

10 MR. MONDE: Yes, sir.

11 THE COURT: All right. How about you,
12 Ms. Weiner? How do you feel? Do you want something
13 after the 19th, or do you feel like we can just see
14 if y'all reach an agreement, and you'll call me if
15 you need something? How would you like to proceed?

16 MS. WEINER: We, Your Honor, would like to
17 put another date on the calendar to check in with the
18 Court after the 19th. Respectfully, some of the
19 representations today regarding plaintiffs' delay and
20 timing is quite frustrating, given that I've been
21 trying to get a response on this. And I'm hearing
22 schedules with the Court with defense counsel for the
23 last several weeks, since Ms. Bevel has been reaching
24 out. And there was no response on the defense side.

25 So we would like to keep this process

1 moving. And, unfortunately, believe that might take
2 some assistance of the Court right now.

3 THE COURT: I can offer you the 20th and
4 21st, the afternoons of those two days. Any takers?

5 MR. MONDE: Judge, I need to be part of
6 that, and I cannot. I'm taking my family to the
7 Dominican Republic. My family is currently scattered
8 across the world. We're getting together from the
9 19th to the 24th, and we're going to be in the
10 Dominican Republic. And if I get on a phone call
11 even with Your Honor for work during that time, I
12 will be persona non grata.

13 MS. WEINER: How about before the 19th?

14 THE COURT: But we have deadlines on the
15 19th.

16 MR. MONDE: It's actually the 17th, Judge.

17 THE COURT: Was it the 17th?

18 MS. WEINER: But the 17th was only going to
19 be our expert disclosure deadline if we don't agree
20 to extend the schedule. So we can -- once we find
21 out from Mr. Monde on the 12th what the timing looks
22 like, we can make a decision. And we will frankly
23 need to make a decision by the end of the week, the
24 14th, regarding our interest in extending the
25 schedule, or proposing a schedule for the expert

1 disclosures and class certification. So we can be
2 available either at the end of the week on the 14th
3 or on the 17th.

4 THE COURT: Well, I can't do right at the
5 moment -- when are you leaving for the Dominican
6 Republic?

7 MR. MONDE: I'm leaving on Thursday --
8 whatever that Thursday is. So I'm leaving on the
9 20th.

10 THE COURT: Might do something Wednesday?

11 MR. MONDE: I could do Wednesday, the 19th,
12 sir.

13 THE COURT: Well, here's the situation.
14 Right now I'm scheduled to be in Las Cruces. I'm
15 going to travel on the 16th, and be down there the
16 17th, 18th and 19th. And it looks like I'm back up
17 here on the 20th. But I think there is some rumbling
18 that I may not need to be down there all three days.
19 Is that right?

20 THE CLERK: I scheduled sentencings. So
21 I'm not sure how long we'll be there that day, two
22 sentencings.

23 (A discussion was held off the record.)

24 THE COURT: On the 14th, I've just got
25 court business. I've got to block it out. The 13th

1 I'm in trial. There is a possibility that that could
2 get, you know, shortened. But who knows at this
3 point. That's the trial I'm in right now, the
4 21-dayer. That's the last day. On the 12th, I've
5 got a suppression hearing. If that thing were to get
6 done early, do you think y'all could meet earlier in
7 the day? And then if I've got a problem, we get
8 together later in the day.

9 MR. MONDE: Yes.

10 MS. WEINER: That's fine for me, Judge.

11 THE COURT: What if we did this: Let me --
12 I've got three days in play. What if I gave you 4:00
13 on the 12th, and if I can't do it, I'll let you know.
14 And I'll also give you 4:00 on the 13th. So if I
15 can't do it on the 12th, I'll do it on the 13th. And
16 if I can't do it the 12th and 13th, then on that
17 Wednesday, we'll set it at 4:00 that day. Now, I may
18 be traveling, so I might be calling in.

19 MR. HABERMAN: Counsel, Judge, but why
20 don't we just see how the parties can resolve it on
21 our own?

22 THE COURT: We're certainly going to allow
23 that. But I need to set some dates here. Because,
24 as you can imagine, you know, there are other people
25 clamoring for time. So I think it would be better to

1 get you on there, and then if we have to vacate,
2 we'll vacate. So let me give you 4:00 on Wednesday,
3 which will be the 19th. Is that too late in the day
4 for you? Are you going to be working a full day that
5 day?

6 MR. MONDE: Yes, sir.

7 THE COURT: All right. So we'll set that.
8 And if need be, I may all be traveling so we may all
9 have to call in. We may have to record it.

10 MR. MONDE: We've done that before.

11 THE COURT: We might have. So that will
12 give us some time. I hate to do this to you, but
13 that day of the suppression hearing, if I get in the
14 middle of the hearing, and it looks like it's going
15 to go long, I may have to call you on rather short
16 notice and say it's not working.

17 MR. MONDE: Judge, we thank you for your
18 time, especially hearing some of these issues. And
19 we'll work with that.

20 THE COURT: All right. Let me start with
21 you, Ms. Weiner. Can you live with what we've
22 sketched out here?

23 MS. WEINER: Yes, Judge. I just have one
24 other issue that I'd like to raise, and we don't need
25 to -- I hope it's just a housekeeping matter. David,

1 now that we've dealt with this RJRT issue and what is
2 going to be produced, I expect you and I can -- and I
3 will get you what I promised I would get you this
4 morning, those invoices. But we can resolve the
5 other issue before next week and the next time we
6 come before the Court. Are we on the same page with
7 that?

8 MR. MONDE: When I receive the invoices, I
9 will call you so that we can address the last issue.

10 And Judge, let me just be clear what this
11 is about. In connection with the predictive coding
12 issue that we ran into, we reimbursed the plaintiffs
13 for the cost of the lawyer to go up there and take
14 the deposition. Ms. Weiner has subsequently written
15 and said that they have incurred extra storage costs,
16 electronic storage costs, that but for this delay in
17 the production, they wouldn't have incurred these
18 three months' of costs. We have agreed to pay those
19 subject to getting the backup documentation, number
20 one. And number two, that this is the end of it;
21 that we're buying peace. We've put this in the
22 rearview mirror. There will not be issues or motions
23 related to it. I think Ms. Weiner and I are going to
24 be able to reach agreement on that. We certainly
25 need to have another discussion between ourselves

1 before we trouble the Court with it. But that's
2 where we're headed.

3 THE COURT: What are you asking or wanting
4 the Court to do, Ms. Weiner, about that issue?

5 MS. WEINER: This has been another
6 outstanding issue, Judge. I just wanted to put it
7 out there, that this is outstanding. I'm not going
8 to raise it in front of the Court at this time,
9 simply because we are here, we're continuing to meet
10 and confer, and it's my hope that David and I can
11 resolve this before next week. But if we cannot, I
12 am going to bring this issue before the Court. I
13 don't want to end up in a place where we were here
14 talking about discovery issues and I didn't at least
15 raise it. So we don't need to talk about it.
16 Hopefully, we can resolve it but if not, we will
17 submit something to the Court.

18 THE COURT: So you're comfortable with Mr.
19 Monde's suggestion of y'all meeting and conferring
20 some more on that issue?

21 MS. WEINER: That's fine. There is more
22 than one category of costs that the defendants have
23 agreed to pay, so that I don't agree with. But I
24 will happily send the invoices that I said I would.
25 And David I will talk about it this week.

1 MS. WEINER: I was trying to spare the
2 Court the gory details.

3 THE COURT: All right. Is there anything
4 else about what we've put together -- are you
5 comfortable with it, Ms. Weiner?

6 MS. WEINER: Yes, Your Honor.

7 THE COURT: All right. Is there anything
8 else that we need to discuss? Anything else I can do
9 for you today, Ms. Weiner?

10 MS. WEINER: Nothing pressing, Your Honor.

11 THE COURT: All right. How about you, Mr.
12 Monde?

13 MR. MONDE: No, sir.

14 THE COURT: All right. I appreciate
15 y'all's presentations. We'll try to -- well, maybe
16 you'll get it all worked out and we won't need a
17 hearing. Obviously, if y'all get it all worked out,
18 let Ms. Bevel know, and we'll vacate those times, and
19 probably use them some other way, and -- but if you
20 need them, then just bear with us, because we're
21 going through -- you can see those gentlemen in the
22 back -- we're going to start a retrial of a case. So
23 I'm going to have two trials kind of going on. Are
24 they going to be going on at the same time? Sort of.
25 Theirs is a jury trial, so they'll get theirs banged

1 out. But this one, because of them asking for
2 additional days, I wasn't able to give them seven
3 consecutive days. So we're kind of scattering out
4 those seven days. So we've got five more to go. All
5 right. Appreciate your presentations. Be safe on
6 your trips. If I don't see y'all before the
7 holidays, have nice holidays.

8 (The Court stood in recess.)
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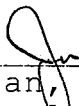
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DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on December 8, 2018.



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